IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD W. HAUKSSON, Appellant.	No. 38602-0-II UNPUBLISHED OPINION

Armstrong, J. — Richard Hauksson appeals his conviction for felony driving while under the influence of intoxicants (DUI), arguing that the trial court employed the wrong standard of proof for the four prior DUI convictions required to elevate the crime from a gross misdemeanor to a felony. The State concedes that the parties and the court employed the wrong standard of proof. Accepting the State's concession, we reverse and remand.[1]

Facts

On September 29, 2007, Washington State Trooper Collin Overend-Pearson saw Hauksson make a turn into a parking lot without signaling. He also saw that Hauksson was not wearing his seatbelt. He yelled at Hauksson to put on his seat belt. Hauksson replied with an obscenity. The trooper then stopped Hauksson for failure to signal and for failure to wear a seat belt. Hauksson started walking away from his vehicle but returned when the trooper directed him to do so. The trooper noticed that Hauksson's face was flushed, that he had watery and bloodshot eyes, and that he had difficulty retrieving the documentation the trooper requested of

[1] A commissioner of this court initially considered Hauksson's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

him. Hauksson agreed to undertake field sobriety tests. Hauksson failed those tests. The trooper arrested Hauksson for DUI. He then searched Hauksson's car and found empty alcohol containers.

The State charged Hauksson with felony DUI under RCW 46.61.502(6)(a), which makes a DUI a class C felony if the defendant "has four or more prior offenses within ten years as defined in RCW 46.61.5055." Former RCW 46.61.5055(13) (2007) defines "prior offense" to include convictions for DUI and deferred prosecutions for DUI. The State alleged that Hauksson had four such prior offenses: two DUIs in Tacoma Municipal Court in 1999 and 2000, a DUI in King County District Court in 2000, and a DUI in Pierce County District Court in 2000.

Hauksson waived his right to a jury trial. Through counsel, he and the State then entered into the following order:

> The above-entitled matter having come on regularly for bench trial with the parties, and the Court being fully advised in the premises, it is hereby agreed by the parties that evidence of the defendant's prior convictions pursuant to RCW 46.61.5055(13) will be used to prove the sentence enhancement and will not be offered by the State in its case in chief, unless in accordance with the Evidence Rules and after a judicial determination. These prior convictions will be offered to the court and must be proven by a preponderance of the evidence for the sentence enhancement if a guilty verdict is reached after either bench or jury trial.

Clerk's Papers at 20.

The trial court signed the order. Trooper Overend-Pearson testified as described above. Hauksson did not testify. The trial court found him guilty of DUI. At the sentencing hearing, the State offered certified copies of the dockets for the four prior DUI convictions, but did not offer certified copies of the judgments for those convictions. It stated that the judgments in Tacoma Municipal Court had been archived and then destroyed, but did not explain why the King County

District Court and Pierce County District Court judgments were not available. Hauksson argued that the copies of the documents were insufficient evidence to establish the prior DUI convictions. The trial court found that the State had proved the four prior DUI convictions by a preponderance of the evidence, found Hauksson guilty of felony DUI, and sentenced him within the standard range.

Analysis

Hauksson argues, for the first time on appeal, that the parties and the trial court employed the wrong standard of proof as to the four "prior offenses" required to elevate his DUI from a gross misdemeanor to a felony under RCW 46.61.502(6)(a). He contends that those four prior offenses are essential elements of the crime, to be proved beyond a reasonable doubt, rather than sentence enhancements, to be proved by a preponderance of the evidence. *State v. Draxinger*, 148 Wn. App. 533, 535, 200 P.3d 251 (2008); *State v. Roswell*, 165 Wn.2d 186, 192, 196 P.3d 705 (2008); *State v. Oster*, 147 Wn.2d 141, 145-46, 52 P.3d (2002). The State concedes he is correct. We agree and reverse Hauksson's conviction for felony DUI.

Hauksson filed a statement of additional grounds, under RAP 10.10, in which he contends that he was already parked in the parking lot, and had just removed his seat belt, when Trooper Overend-Pearson first saw him. But Hauksson did not testify at trial and cannot introduce testimony on appeal. He also argues that pictures of the alcohol containers did not show that they were unopened. But the trooper testified that the containers were open and empty. Hauksson's additional grounds are meritless.

The State asks that we remand for entry of judgment and sentence on the gross

misdemeanor of DUI. *State v. Atterton*, 81 Wn. App. 470, 473, 915 P.2d 535 (1996). But we decline to bind the trial court's authority. We remand to the trial court for further proceedings consistent with this opinion.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

Armstrong, J.

We concur:

Houghton, J.

Penoyar, A.C.J.